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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSEPH ERIC PESTI,<br><br>Defendant and Appellant. | H042613<br>(Santa Clara County<br>Super. Ct. No. C1387827 & C1366346) |

Defendant Joseph Eric Pesti appeals from the trial court's denial of his petition for resentencing pursuant to Proposition 47. (Pen. Code § 1170.18, subd. (a)).[1] He asserts that his felony convictions of second-degree burglary now qualify as misdemeanor shoplifting offenses as defined by section 459.5. In addition, defendant argues that the trial court erred in imposing sentencing enhancements for his prior prison terms and on-bail status, because the court had already designated these prior convictions as misdemeanors pursuant to Proposition 47.

## STATEMENT OF THE FACTS AND CASE

On July 22, 2013, defendant went into the Mission Lanes Bowling Alley in Milpitas at 2:00 p.m., broke the side glass portion of a gaming machine and stole several

[1] All further unspecified statutory references are to the Penal Code.

items from the top rack. The police report of the theft states that the value of the property defendant stole was $750.00.

On August 16, 2013, defendant went into Golfland Video Arcade in Sunnyvale, drilled a small hole into a game prize dispenser and removed a prize voucher for an Apple iPod Mini. Defendant returned to the Golfland the next day and attempted to redeem the stolen voucher.

On January 15, 2014, defendant was charged with three counts of second-degree burglary (§§ 459, 460, subd. (b); counts 1-3), two counts of vehicle burglary (§§ 459, 460, subd. (b); counts 4, 7), 10 counts of receiving stolen property (§ 496, subd. (a); counts 5, 8-16, 21), two counts of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); counts 6, 19), two counts of using personal identifying information without authorization (Pen. Code, § 530.5, subd. (a); counts 17-18), and one count of misdemeanor possession of controlled substance paraphernalia (Health & Saf. Code, § 11364.1; count 20). The complaint alleged three prior strikes (§§ 667, subds. (b)-(i), 1170.12), three prior prison terms (§ 667.5, subd. (b)), and that defendant committed the offense while on bail (§ 12022.1).

On February 10, 2014, defendant pleaded no contest to two counts of second-degree burglary, and one count of using personal identifying information without authorization. Defendant also admitted the three prior strike convictions, the three prison priors and the on-bail enhancement. The remaining charges were dismissed.

On September 12, 2014, the trial court granted defendant's motion to dismiss his prior strikes pursuant to section 1385.

On October 10, 2014, the trial court sentenced defendant on the case referenced above, as well as a new case involving a conviction of buying or receiving stolen property. (§ 496, subd. (a)). For both cases, defendant was sentenced to a total of seven

years four months in state prison. The court struck one of the prison priors, but imposed a sentence for two prison priors and the on-bail enhancement.

On February 24, 2015, defendant filed a petition for resentencing pursuant to Proposition 47. The court granted defendant's petition with regard to his conviction for buying or receiving stolen property, reduced the conviction to a misdemeanor, and recalled his sentence. The court denied defendant's petition with regard to the second-degree burglaries, and the prior enhancements, finding that they were not eligible for resentencing under Proposition 47. Defendant brings this appeal.

## DISCUSSION

Defendant asserts that the trial court erred in denying his petition for resentencing of his convictions for second-degree burglary pursuant to Proposition 47 because they now qualify as misdemeanor shoplifting as defined by section 459.5. In addition, defendant argues that his prison prior and on-bail enhancements could not be used as such, because the convictions underlying them were reduced to misdemeanors in a previously decided Proposition 47 petition.

On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 "reduced the penalties for a number of offenses." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*)).

Section 1170.18, which was added by Proposition 47, "creates a process where persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing." (*Sherow*, *supra*, 239 Cal.App.4th at p. 879.) Section 1170.18, subdivision (a) specifies that a person may petition for resentencing in accordance with section 490.2.

"[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*Sherow, supra,* 239 Cal.App.4th at p. 878.) The

petitioner for resentencing has the "initial burden of proof" to "establish the facts[] upon which his or her eligibility is based." (*Id.* at p. 880.) If the crime under consideration is a theft offense, " 'the petitioner will have the burden of proving the value of the property did not exceed $950.' [Citation.]" (*Id.* at p. 879.) In making such a showing, "[a] proper petition could certainly contain at least [the petitioner's] testimony about the nature of the items taken." (*Id.* at p. 880.) If the petition makes a sufficient showing, the trial court "can take such action as appropriate to grant the petition or permit further factual determination." (*Ibid*.)

Proposition 47 added the new crime of shoplifting to the Penal Code to address the issue of second-degree burglaries that involve property values that are less than $950 (§ 459.5). Shoplifting is defined as "[E]ntering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior [specified] convictions . . . may be punished pursuant to subdivision (h) of Section 1170. [¶] (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5)

The question of whether defendant is eligible for resentencing of his second-degree burglary convictions in this case is dependent upon whether he would have been guilty of misdemeanor shoplifting if Proposition 47 had been in effect in 2013 when he committed the offenses.[2] Of particular importance in this inquiry is whether defendant stole property from "commercial establishments" within the meaning of section 459.5.

[2] The issue of whether section 1170.18 impliedly includes second-degree burglary of property valued at $950 or less is currently on review before the California Supreme

In denying defendant's petition with regard to the second-degree burglary convictions, the trial court found that the bowling alley and video arcade did not qualify as "commercial establishments" under the shoplifting statute. The court stated: "commercial establishment as it is to be construed within the meaning of Penal Code section 459.5 means exactly that, an establishment that is engaged in commerce; that is, the buying, selling and trading of goods and merchandise." The court further stated that defendant was ineligible for resentencing because the items taken in this case were not "property that was available for sale or purchase," and that defendant "had to forcibly break into closed machines of some sort in order to remove the property from those machines."

While "commercial establishment" is not specifically defined in Proposition 47, nor is it defined by the Penal Code, we consider the ordinary meaning of the words themselves. "A dictionary is a proper source to determine the usual and ordinary meaning of a word or phrase in a statute." (*E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1258, fn. 2.)

The Merriam-Webster Online Dictionary (2016) provides a simple definition for commerce as follows: "[A]ctivities that relate to the buying and selling of goods and services." (See < http://www.merriam- webster.com/dictionary/commerce> [as of Nov. 7, 2016].) Black's Law Dictionary defines establishment as, "2. An institution or place of business." (Black's Law Dict. (8th ed. 2004) p. 586, col. 1.) Commerce is defined as "The exchange of goods and services, esp. large scale involving transportation between cities, states, and nations." (*Id.* at p. 285, col. 1.)

In addition to the dictionary definitions of commerce and establishment cited above, we note that the regulations promulgated by the U.S. Copyright Office provide:

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Court in *People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted, Feb. 17, 2016, S231171.

"The term 'commercial establishment' means an establishment used for commercial purposes, such as bars, restaurants, private offices, fitness clubs, oil rigs, retail stores, banks and financial institutions, supermarkets, auto and boat dealerships, and other establishments with common business areas . . . ." (Patents, Trademarks, and Copyrights Regs. 37 C.F.R. §258.2 (2015).)

In *In re J.L.* (2015) 242 Cal.App.4th 1108, 1114, the court found that stealing a cellular telephone from a school locker did not qualify for resentencing under Proposition 47. It determined that, "[w]hatever broader meaning 'commercial establishment' as used in section 459.5 might bear on different facts, [the defendant]'s theft of a cell phone from a school locker room was not a theft from a commercial establishment." The court gave the words their common sense meaning, and defined commercial establishment as "one that is primarily engaged in commerce, that is, the buying and selling of goods or *services.*" (*Ibid.*, italics added.)

We find that the trial court's interpretation of commercial establishment is inconsistent with the common meaning of the words as discussed above. A bowling alley is an establishment used for commercial purposes, in which customers pay for the use of bowling lanes and balls, purchase food and beverages, and rent shoes. In addition, bowling alleys contain games and prizes that are associated with winning the games. Similarly, a miniature golf arcade is also a commercial establishment, because customers can pay for the use of the golf course, balls and clubs, purchase food and beverages, and play arcade games to win prizes.

The trial court erred in denying defendant's petition for resentencing on the ground that the bowling alley and the golf arcade were not commercial establishments within the meaning of section 459.5.[3] Because the court denied the petition on that

[3] Because we reach the conclusion that a second-degree burglary may qualify as misdemeanor shoplifting under Proposition 47, we do not consider defendant's equal protection argument.

ground, it did not consider whether the property that was stolen was valued at $950 or less. Defendant's petition in the trial court stated that the police report contained the victim's estimate that the value of the property taken at the bowling alley was approximately $750. However, there is no evidence in the record to support that assertion, and the court made no specific finding of value.

Because the record does not contain evidence that the value of the property that defendant stole at the bowling alley or the Golfland Arcade was $950 or less, the matter must be reversed and remanded for a subsequent petition demonstrating value. We note that a petition containing a declaration regarding the remaining elements of shoplifting could be sufficient to set the matter for hearing. (See *Sherow, supra,* 239 Cal.App.4th at p. 880.)

***Felony Sentencing Enhancements***

Defendant argues that the court erred in enhancing his sentence based on the fact that he had served two prior prison terms (§ 667.5, subd. (b)), and was on bail when he committed the crimes in this case (§ 12022.1, subd. (b)). He asserts that because the convictions underlying the enhancements were designated as misdemeanors pursuant to Proposition 47 before his resentencing in the present case, they cannot be used as felony enhancements.

The enhancements for a prior prison term and on-bail status require a previous felony conviction. Section 667.5, subdivision (b), requires imposition of a one-year enhancement for each of a defendant's prior felony convictions that resulted in a separate term of imprisonment, when the defendant commits another felony within five years of release from custody. (See *People v. Abdallah* (2016) 246 Cal.App.4th 736, 740 (*Abdallah*).) "Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and

(4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.)

The on-bail enhancement is stated in section 12022.1, and "provides that if one commits a felony while released on bail . . . pending final resolution of an earlier felony charge, he shall serve 'two years in state prison' additional and consecutive to any other prison term imposed for either offense." (*In re Jovan B.* (1993) 6 Cal.4th 801, 808-809.)

Here, defendant's sentence was enhanced based on prior convictions for petty theft with a prior conviction, possession of stolen property, and attempted commercial burglary, all of which were felonies at the time he committed those crimes (§§ 666, 496, subd. (a), 459-460, subd. (a).). However, on April 14, 2015, the court designated these convictions as misdemeanors pursuant to Proposition 47.[4] Following the designation of the prior convictions as misdemeanors, the trial court resentenced defendant in the present case on June 3, 2015 and July 15, 2015, and used the same convictions as felony priors to enhance defendant's sentence.

Defendant argues that the trial court's use of his prior convictions to enhance his sentence in this case *after* the court had already designated the convictions as misdemeanors was in direct contravention of the specific language of Proposition 47, which provides "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes . . . ." (§ 1170.18, subd. (k).)

The recent case of *People v. Abdallah, supra*, 246 Cal.App.4th 736, addresses the issue of whether a prior felony that has been designated a misdemeanor pursuant to Proposition 47 may be used to enhance a subsequent felony sentence under section 667.5, subdivision (b). In *Abdallah*, the court held that in light of section 1170.18, subdivision

[4] We took judicial notice of the April 14, 2015 orders re-designating the convictions as misdemeanors.

(k), "where . . . a prior conviction is no longer a felony *at the time the court imposes a sentence enhancement under section 667.5*, Proposition 47 precludes the court from using that conviction as a felony merely because it was a felony at the time the defendant committed the offenses. (*Abdallah, supra,* at p. 747, fn. omitted, italics added.)

In reaching that conclusion, the *Abdallah* court relied largely on *People v. Park* (2013) 56 Cal.4th 782 (*Park*), in which the Supreme Court considered whether a court order reducing a wobbler to a misdemeanor precluded its later use as the basis for a felony sentence enhancement. The court held that it did, explaining "when the court in the prior proceeding properly exercised its discretion by reducing the [felony] conviction to a misdemeanor, that offense no longer qualified as a prior serious felony within the meaning of section 667, subdivision (a), and could not be used, under that provision, to enhance defendant's sentence." (*Id*. at p. 787.)

In *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*), the court of appeal reached a similar conclusion regarding legislation that re-designated the defendant's prior felony as a misdemeanor. The *Flores* court held that a defendant's prior felony conviction for possession of marijuana that had been re-designated a misdemeanor by subsequent legislation could not be used as the basis for a felony sentencing enhancement. (*Id*. at pp. 470-471) In reaching that conclusion, the *Flores* court: "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id.* at p. 471.) And while the marijuana legislation in *Flores* did not *expressly* provide for the reduction of prior felony convictions to misdemeanor status, the court concluded that the legislation's clear language (including a

requirement that all records pertaining to such convictions be destroyed) demonstrated it "intended to prohibit the use of the specified records for the purpose of imposing any collateral sanctions." (*Id.* at p. 472.)

Thus, pursuant to *Flores* and *Park*, when a felony is reduced to a misdemeanor, whether by legislation or court order, it cannot thereafter be used to support a felony sentence enhancement.

The Attorney General argues that the designation of defendant's prior felony as a misdemeanor has no effect on whether that conviction can be used as a prior prison or on-bail sentencing enhancement because "[s]entence enhancements for prior prison terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving rise to the current conviction." (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936.) In other words, the sentencing enhancement is based on the fact that the defendant had served a prior prison term or was out on bail when he committed the new offense, not on the felony status of the prior convictions.

The Attorney General's argument fails to take into account the fact that by their own definitions, both sections 667.5 for the prior prison term and 12022.1 for the on-bail status require previous *felony* offenses. The felony status of the prior conviction is inherent in the definitions of the enhancements themselves. Without a felony prior conviction, the enhancements cannot be imposed. Here, there were no felony prior convictions upon which the court could impose the enhancements, because the court had already designated those convictions misdemeanors pursuant to Proposition 47.

We find that the court erred in imposing the prison prior and on-bail sentencing enhancements in this case, because the convictions underlying the enhancements were designated misdemeanors pursuant to Proposition 47.[5]

[5] We note that the Supreme Court has granted review of several cases that address the propriety of the use of prior felonies that have been designated as misdemeanors as sentencing enhancements. (E.g., *People v. Williams* (2016) 245 Cal.App.4th 458, review

## DISPOSITION

With regard to the petition for resentencing of the two second-degree burglary convictions, the matter is reversed and remanded for the trial court to consider a subsequent petition containing evidence of the value of the property stolen in this case.

With regard to the sentencing enhancements, the judgment is modified to reflect that the sentencing enhancements based on defendant's prior prison commitments and on-bail status are vacated.

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granted May 11, 2016, S233539; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Buycks* (2015) 241 Cal.App.4th 519, review Jan. 20, 2016 (S231765)).

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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GROVER, J.

***People v. Pesti***
**H042613**